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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 384.

CORNELL STEAMBOAT COMPANY,

Appellant,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and NATIONAL WATER CARRIERS ASSOCIATION, INC.,

Respondents.

REPLY BRIEF FOR APPELLANT.

ROBERT S. ERSKINE,
Counsel for Appellant.

Paulick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and NATIONAL WATER CARRIERS ASSOCIATION, INC.,
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Appeal from the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR APPELLANT.

I.

The Government's brief wrongly asserts that the case of *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, is authority for the contention that the status of towers as "non-carriers" at common law is no constitutional bar to their being considered common carriers for purposes of a regulatory act (Government's brief, pp. 20, 48), and that the status of towers under a regulatory act must be determined by the language of the particular statute rather than by any common law rule of liability (Government's brief, p. 34).

In the *Stimson Lumber* case, the decision rested upon the fact that the tug owners were not engaged in the business

of towing, but were engaged in the business of common carriers, the use of their tugboats being incidental to the performance of their contracts of carriage, and the manner of carriage of the logs (at the end of towing lines) being the equivalent of carrying the logs on the tugs themselves. This Court pointed out that the status of those tug owners was not determined by legislative enactment, but by the character of the business in which they were engaged. This Court said at page 211:

> "In all essential particulars, that service is like the carriage of freight in vessels. * * * The tariff filed by the Northwestern Tow Boat Owners Association shows that fifty owners held themselves out as engaged in the business of common carriers, including the towing of logs; * * * They are common carriers not because of legislative fiat, but by reason of the business they carry on."

That decision in no way altered the established law that an independent tower, who merely contracts to furnish towage services and does not contract to carry anything, is not engaged in the business of a carrier (Appellant's brief, pp. 11-17).

II.

The Government's brief, as at pages 18 and 34, contains statements to convey the impression that under the established law previously to the Transportation Act of 1940 independent towers were always carriers, but were merely "relieved from the strict rule of liability of a common carrier."

The status of independent towers under the established law does not rest on any such qualified basis. The

decisions of this Court and the lower courts were not confined to "relieving" independent towers from liability, but were based squarely on the proposition that independent towers who merely contract to furnish towage services are not engaged in the business of carriage or transportation under the common and accepted meaning of the words, (Decisions cited in the footnote of appellant's brief, pp. 14-15).

III.

The Government attempts to hurdle the established "non-carrier" status of the independent towers by arguing that the definitions in Section 302(c), (d) and (e) were intended to set up new categories of common and contract carriers different from those which had been generally understood under the common law definitions of the words (Government's brief, pp. 28-36).

Appellant submits that the definitions in Section 302(c), (d) and (e) do not differ in any material respect from the common law definitions as previously stated by the courts (Appellant's brief, p. 17). Indeed, the brief filed by the Government before the United States District Court in this proceeding contained the following admission (p. 48):

> "The definitions of common and contract carrier in Part III, sec. 302(d) (e) are those of the common law. * * *"

And the provisions in Section 309(a) and (f), granting "grandfather rights" to persons who were engaged in the business of common and contract carriers on January 1st, 1940, some eight months before the Act became law, indicate that Congress was referring only to common and contract carriers as generally understood previously to the

Act, under the established law, and was not creating any new categories.

IV.

The Government's brief, in the footnote to pages 30-31, quotes from the Congressional Record a statement which is alleged to support the contention that Congress regarded all independent towers as carriers. The statement does not support that contention. It will be noticed that the statement referred to carriers operating on the Mississippi River, and the carriers on that river perform their contracts of carriage by means of their own barges and tugs, as described in *Union Barge Line,* 250 I. C. C. 689. The use of their own tugs by such carriers in performing their contracts of carriage is to be distinguished from towage services performed by independent towers who carry nothing (Appellant's brief, pp. 28-37).

V.

Throughout the Government's brief there is an underlying argument that the questions raised by the appellant should be determined on the assumption that Congress intended the provisions of Part III of the Act to place water-carriers upon an equality of regulation with rail and motor carriers. The numerous exemptions and limitations expressly set forth in the provisions of Part III squarely negative that argument. In fact, the Commission itself, in its 57th Annual Report of November 1st, 1943, made the following statement:

> "Both from the facts of record in decided and pending applications and from preliminary investiga-

> tions pursuant to Section 304(b), it has become apparent that the extent of our jurisdiction is limited to a small portion of the total transportation by water performed in the United States."

That Congress intended such result and did not intend to put water carriage on an equality of regulation with other forms of carriage is not only indicated in the provisions of Part III, but was also indicated by Senator Wheeler in his report to the Senate (Congressional Record, September 9th, 1940, pp. 11766 and 11768).

> "The Senate bill contained certain exemptions from the regulation proposed for water carriers *** The conferees felt that these more liberal amendments should be adopted at this time, on the theory that, if experience should show that more extensive regulation is necessary, that can be accomplished at a future time."

VI.

The foregoing comments also emphasize the error in the Government's underlying argument that regulation of water-carriers, in order to be effective, must be all-inclusive, and therefore Congress should be assumed to have intended to bring independent towers under regulation. Congress (expressly) did not intend the provisions of Part III to be all-inclusive with respect to persons furnishing incidental services to the carriers.

The Commission's assertion of its "all-inclusive" argument in the effort to subject to regulation persons other than those specified by Congress is not a sound or just basis for determining the appellant's right to protest regulation

which has not been enacted by Congress itself and which has not been delegated to the Commission by the provisions of Part III.

Respectfully submitted,

Robert S. Erskine,
Counsel for Appellant.

New York, N. Y., February 21st, 1944.